

State of California

Before the State Water Resources Control Board

In the Matter of Improving the Water Right Process and Procedures

**Notice of Public Meeting - Monday, November 27, 2000
at the Paul R. Bonderson Building - 901 P Street,
Sacramento, California**

Written Comments of Robert J. Baiocchi, Consultant

I have reviewed the Notice of Public Meeting before the State Water Resources Control Board in the matter of improving the water right process and procedures.

As noticed in the public notice, the Board's notice stated the following: "Because it is difficult to predict how many individuals will participate, it would be helpful if those persons intending to appear would reduce their comments and suggestions to writing and submit them to Harry Schueller, Chief, Division of Water Rights, by November 20, 2000".

The following are my written comments and recommendations to the Board in improving the water right process and procedures.

Qualifications

1. I have been significantly involved in the water right process for many years and I qualified as a water right expert at the Bay Delta Hearing in 1992. I have filed numerous protests against water right applications and petitions. I have also filed numerous complaints with the Board. I have extensive experience in dealing with the Board and the staff of the Division of Water Rights concerning the water right process.

Application Process - Recommendations

The water right application process should be amended and changed as follows:

(a) Water right application notices are vague and ambiguous, and also boilerplate, which leads to boilerplate formal protests against the applications in some cases. Changes are needed.

(b) Water right application notices should be changed to include a detailed description of the environment to be

affected by the application, including specific information such as fish and wildlife species and their habitat, and also state and federal threatened and endangered species and their habitat that occur in the project area and waterway which could be affected by the application. The recommended application notices change should also include a map of the waterway which includes site locations of all pending water right applications, all existing water right permits, all existing water right licenses, all known existing riparian diversions, all known existing pre-1914 water rights, and also all known unauthorized storage and diversion projects. e.g. Navarro River Watershed and the Russian River Watershed

(c) Water right application protest periods are limited to either 45 days or 60 days. Water right application notice deadline dates for formal protests should be expanded to at least 90 days so that the due process rights of the public is served. e.g. summer months (vacations); holidays, etc. This would help the parties filing late formal protests, to file timely protest, in which their late protests would be denied by the staff of the Division.

(d) Following the water right application protest process, all protestants, including the applicants, should be served with a formal letter by the Division which shows the names and addresses of all protestants and also interested parties.

(e) All formal protests against water right applications should be shown on the Board's Website, and most importantly, including related protests and letters applying to the applications.

(f) All applicants should be required to file answers to formal protests when the protests are accepted by the Division.

(g) In cases when the Division does not accept formal protests, there should be just cause to deny said protests and deny the protestant's due process rights, and not because the protestant's protest was late.

Change Petitions and Extension of Time Petitions - Recommendations

(a) This issue was not addressed by the Board in its notice to improve the water right process and procedures. This issue should be addressed and evaluated, and changes should be made.

(b) Monthly water right petition notices are very vague and very ambiguous with very little information beside vague information by the Division, including no information on the environment to be effected by said petitions.

(c) Petition notices should not be bunched collectively together as the petitions are now on a monthly basis by the Division, but the petition notices should be noticed by the Division on an individual basis.

(d) Water right petition notices should be changed to include a detailed description of the environment to be affected by the application, including specific information such as fish and wildlife species and their habitat, and also state and federal threatened and endangered species and their habitat that occur in the project area and waterway which could be affected by the petitions.

The recommended petition notices change should also include a map of the waterway which includes site locations of all petitions, all pending water right applications, all existing water right permits, all existing water right licenses, all known existing riparian diversions, all known existing pre-1914 water rights, and also all known unauthorized storage and diversion projects.

(e) Water right petition notice deadline dates for formal protests should be expanded from 30 days to at least 90 days so that the due process rights of the public is served. e.g. summer months (vacations); holidays, etc. This would help the parties filing late formal protests after the 30 day protest period in which their protests would be denied by the staff of the Division.

(f) Following the water right petition protest process, all protestants, including the petitioners, should be served with a formal letter by the Division which shows the names and addresses of all protestants and also interested parties.

(g) All formal protests against water right petitions should be shown on the Board's Website, and most importantly, including related protests and letters applying to the petitions.

(h) All petitioners should be required to file answers to formal protests when the protests are accepted by the Division.

(i) Most importantly, petitions are likely to have adverse continued and future direct, indirect, and cumulative environmental impacts to the public trust resources and the environment of the waterways affected by the petitions. e.g. proposed and future development of water rights without full environmental review of the effects of putting the water to full beneficial use and/or changes that have the potential to cause direct, indirect, and cumulative environmental impacts to the public trust resources and the environment of the waterways affected by the petitions.

On a continued basis the Division avoids preparing and/or having prepared CEQA documents for petitions. The Division's Environmental Unit staff do not prepare environmental analyzes concerning the petitions and are precluded from any environmental analysis process by the Division's front office.

Based on my review of a legal opinion from the legal staff of the Board, petitions are subject to CEQA and its Guidelines and should be applied by the Division. However, I can not find that opinion in my files. However and consequently, CEQA should apply to all petitions and should be applied by the Division in all petition matters. That would be reasonable and in the public interest as well as in compliance with the provisions of CEQA and its Guidelines.

(j) All petitions for extension of time should be subject to CEQA and its Guidelines and/or subject to a full environmental analysis for the simple reason that "what is seen today (streams, flows, fish habitat, water quality, etc.) will be different when the water right is put to full use". In nearly all cases, environmental protests against petitions for extension of time are dismissed by the Division, and said petitions are granted by the Division with long term extensions without environmental review.

Compliance - Recommendations

(a) Full compliance of all of the terms and conditions of all water right permits and licenses is essential to protecting the beneficial uses of the state's water and to prevent violations and theft of the state's water. Without full compliance by permittee and licensees and the monitoring of compliance of all permits and licenses by the Board's staff, there would be no compliance which would likely effect public trust resources and other beneficial uses of the state's water.

(b) It is my understanding that there are at least 14,000 to 16,000 water right permits and licenses issued by the Board. With this vast amount of permits and licenses issued by the Board, and with a limited staff to review said permits and licenses, it would likely take a decade or more to conduct adequate monitoring for compliance of all permits and licenses issued by the Board in California, while at the same time threatened violations would continue to occur.

(c) The Board should develop a "compliance monitoring program" that would assure to the public that the chief water enforcement agency is in fact monitoring all permits and licenses for full compliance. Of course, the Board would have to increase its compliance staff in order to review the records for compliance and also to conduct on-site field inspections. Once a program of this type is initiated and

carried out by the Board and its staff, the word among water users would get out and good faith compliance may occur.

(d) In cases where permittees and licensees have not complied with the terms and conditions of their permits and licenses, the Board and its staff should take vigorous legal actions against illegal activities pursuant to Section 1051 et seq. of the California Water Code. Also see Section 1825 of the California Water Code.

(e) Should the Board and its staff initiate and implement a "compliance monitoring program", the results of said compliance monitoring program investigations should be shown on the Board's Website so that the public is assured that the chief water enforcement agency is in fact taking actions to protect the beneficial uses of the state's water, including protecting public trust resources which are owned by the people of the State of California.

Enforcement - Recommendations

(a) The Board is the chief enforcement agency in the State with respect to the illegal diversion, storage, and use of the state's water. The Division of Water Rights is the staff of the Board. The Board is required to prevent the unauthorized divert and use of the state's water. In California, water is more valuable than gold.

(b) Simply put, the Division is not taking any responsible legal actions concerning the unauthorized diversion, storage and use of the state's water. e.g. Navarro River watershed and Russian River watershed.

(c) The Division simply request an illegal diverter to file a water right application with the Board and the illegal diversion continues without requiring the illegal diverter to cease diverting the state's waters or without requiring the illegal diverter pay fines at \$500 per day. The Division's actions are simple out of control.

(d) The Board needs to take responsible actions in preventing the unauthorized diversion, storage, and use of the state's water pursuant to Section 1051 et seq of the California Water Code. This enforcement action should include that the illegal diverter cease diverting the state's water, pay fines, and divert water following the issuance of a water right permit.

Licensing - Recommendations

(a) Before a permit is licensed by the Board, the permit should be subject to full environmental review by the Board's staff and also subject to modification by the Board so that the terms and conditions of the proposed license will not

have any adverse environmental effects on public trust resources.

Hearings - Recommendations

(a) The hearing staff should be fair and neutral. Recently one hearing staff person acted improperly. I requested an investigation of that person by the Chairman of the Board. In my extensive dealing with the staff of the Division, that hearing staff person acts as the petitioner, the board and judge, the board's staff attorney(s), and the board's environmental staff. The hearing staff should be prohibited by the Board to act as the petitioner; prohibited from acting as the board and judge; prohibited from acting as the Board's legal staff, and also prohibited from acting as the Board's environmental staff. The hearing staff should be fair and neutral. See Exhibit "A" of this submittal.

(b) "Key Issues" are prepared by the Hearing Staff for hearings before the Board. In order to have a level playing field and fairness on the Board's part, parties participating at hearing should be given the opportunity to submit "key issues" to the Hearing Staff as opposed to the hearing staff solely developing those "key issues" based on personal and Division bias. The "key issues" by the hearing staff may be bias such as shown above under (a) or influenced by parties participating at the hearing. I have participated at many hearings, but I have not received a call from the Hearing Unit Staff regarding recommended "key issues". Also "key issues" developed by the hearing staff can influence the outcome of the hearing before the hearing commences.

(c) In some recent hearings, reasonable time was not given by the hearing staff so that parties without a large legal and working staff could prepare for the hearing within a reasonable time frame. The time frame for proposed hearing should be expanded to allow for parties that do not have large legal and working staff to participate in a fair and reasonable manner.

(d) The Board's Hearing Unit should provide formal notice of all hearings at all times to state and federal fish and wildlife agencies in all matters effecting public trust resources. Precluding state and federal agencies with vast authority and responsibilities from being properly noticed by the Division in hearing matters effecting public trust resources shows a unreasonable and improper bias on the part of the Division. The public relies on those state and federal agencies to take part in the Board's hearing process so that the state's fish and wildlife resources such as threatened and endangered species are protected in accordance with the provisions of the state and federal ESAs. e.g. U.S. National Marine Fisheries Service, U.S. Fish and Wildlife Service, and California Department of Fish and Game. See Exhibit "B".

Complaints - Recommendations

(a) This issue was not addressed by the Board in its notice to improve the water right process and procedures. This issue should be addressed and evaluated, and changes should be made.

(b) As a consultant, representing the California Sportfishing Protection Alliance, over the years, a number of complaints I filed on behalf of the CSPA were dismissed by the Chief of the Division of Water Rights.

(c) To serve the due process rights of the parties filing complaints, the Division should prepare a written detailed investigation of all complaints to justify any decision made by the Chief of the Division of Water Rights.

(d) In cases when complaints are filed claiming adverse impacts to federally protected threatened and endangered anadromous species and their habitat, the Division should formally consult with the U.S. National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service to determine whether any adverse impacts have occurred or will occur. Said determinations should be included in the investigative report.

(e) In cases when complaints are filed claiming adverse impacts to state protected threatened and endangered anadromous species and their habitat, the Division should formally consult with the California Department of Fish and Game to determine whether any adverse impacts have occurred or will occur. Said determinations should be included in the investigative report.

(f) In cases when complaints are filed claiming adverse impacts to public trust resources other than threatened and endangered species, the Division should formally consult with the California Department of Fish and Game to determine whether any adverse impacts have occurred or will occur. Said determinations should be included in the investigative report.

Administrative Actions - Recommendations

(a) All administrative actions should provide and serve the public with its due process rights.

Addition to Resources - Recommendations

(a) Specifically the Division's budget for the Compliance Unit and Enforcement Unit should be increased significantly to prevent the theft of the state's water as well as to require full compliance of the terms and conditions of water right permits and licenses. The Division's budget for the

Environmental Unit should also be increased significantly so that all water right decisions by the Division and the Board are supported by a full unbiased environmental evaluations by the Division's Environmental Unit.

Modifications or Development of Regulations- Recommendations

(a) Any modifications to existing regulations should be consistent with the protection of public trust resources and in accordance with: (a) Public Trust Doctrine; (b) The provisions of the Federal Endangered Species Act; (c) The provisions of the State Endangered Species Act; (d) The provisions of the Federal Clean Water Act; (e) The provisions of the California Environmental Quality Act and its Guidelines; (f) The provisions of the Federal National Environmental Policy Act; (g) All case law protecting the environment and public trust resources; and (h) All applicable provisions of state and federal statutes protecting the environment and public trust resources.

(b) Any modifications to existing regulations should serve the due process rights of the public who own the state's waters and the public trust resources.

Amendment of Statutory Mandates - Recommendations

(a) All water transfers should be subject to the provisions of the California Environmental Quality Act in which CEQA documents are prepared with full public disclosure and also with full public participation. The statutes should be amended.

(b) All long term water transfers should be subject to the provisions of the California Environmental Quality Act and its Guidelines in which CEQA documents are prepared with full public disclosure and also with full public participation. The statutes should be amended.

(c) All temporary urgency changes should be subject to the provisions of the California Environmental Quality Act and its Guidelines in which CEQA documents are prepared with full public disclosure and also with full public participation. The statutes should be amended.

(d) All temporary permits should be subject to the provisions of the California Environmental Quality Act and its Guidelines in which CEQA documents are prepared with full public disclosure and also with full public participation. The statutes should be amended.

(e) In cases when water right applications (less than 200 acre-feet) are filed when field investigations are required, existing protests should not be dismissed because the

protestant failed to attend said field investigation. The statutes should be amended to protect the due process rights of the public who file formal protests to protect the environment and the public trust resources that the public own.

The Hearing Records

The hearing record should be made available by request to all parties at no cost to the parties. The public pays for the Division's copiers. The public pays for the Division's paper. The public pays for the salaries of the Division's staff. The public pays for all of the Division's office supplies. Recently in the matter of Salinas Dam the CSPA was advised by the Board's legal staff that the hearing record would cost about \$5,000. The Board is well aware that the public who file environmental protests do not have money to pay for the hearing record in nearly all cases. Consequently the Board protects itself from being sued when the provisions of law are violated. The Board and the Division should make changes so that the public is afforded the opportunity to request the hearing record at no cost which would be reasonable since the public is paying for all of the Division's costs.

That concludes my written comments.

Please forward a copy of the Board's decision in this matter.

Respectfully Submitted

A handwritten signature in cursive script that reads "Bob Baiocchi". The signature is written in dark ink and is positioned above a horizontal line.

Robert J. Baiocchi, Consultant
P.O. Box 1790
Graeagle, CA 96103
Bus Tel: 530-836-1115
Fax: 530-836-2062

Dated: November 16, 2000

Enclosure - Exhibit "A" and "B"

Service List

Mr. Arthur Baggett Jr., Chairman
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Mr. Harry Schueller, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Mr. Jerry Johns, Asst. Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Ms. Victoria Whitney
Hearing Unit
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Mr. Ed Dito
Application and Petition Units
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Mr. Steve Herrera
Environmental Unit
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Interested Parties